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CONFIDENTIAL – FOR SETTLEMENT PURPOSES ONLY

Rosalie K. Rusinko, Esq.
New York State Department of
Environmental Conservation
Division of Environmental Easement, Eastern Field Unit
100 Hillside Avenue, Suite 1W
White Plains, New York 10603

**Re: NYSDEC – Magna Metals (ISC) Site
Sub-Slab Depressurization System**

Dear Ms. Rusinko:

As you know, Baker Capital, L.P., (“Baker Capital”) has completed the installation of a sub-slab depressurization system (“SSDS”) as the landlord of the underlying property in light of the failure of ISC Properties, Inc. (“ISC”) to install the requested system. We have proceeded in good faith for the benefit of our tenants. As in the past, we continue to demonstrate our cooperation with the Department’s on-going investigation and remediation activities at the former Magna Metals Site.

Baker Capital clearly is an innocent landowner and ISC is clearly the party responsible for remaining costs associated with implementing the DEC approved remedy.

The SSDS system was designed and installed by Aztech Technologies, Inc. (See Exhibit 1): Construction was completed and Aztech, who under contract with Baker Capital, will oversee work as required for ongoing system compliance. Baker Capital will provide annual reports to the Department to assure that the SSDS system will remain operational as required by New York State Department of Health guidance. Baker Capital does not see the necessity to nor is it willing to execute an Order on Consent regarding the installation of this system which it is doing for the reasons set forth above.

Relevant Facts

Baker Capital purchased approximately twenty acres of Property formerly owned and operated by “Magna Metals” on December 23, 1982. The Property was owned by ISC, the corporate successor to Magna Metals at the time of Baker Capital’s purchase.



When in active full operation prior to 1979, Magna Metals/ ISC (“Magna”) conducted a metal plating operation with warehousing. Following cessation of operations, Magna emptied leach pits present on the property. Reportedly the Westchester County Department of Health (WCHD) conducted a series of investigations from late 1978 to 1983 including wastewater, sewage overflow, and Furnace Brook sampling.

In 1984, after Baker Capital purchased the property from ISC, the New York State Department of Environmental Conservation (“NYSDEC “; “Department”) resampled the Site and apparently thereafter listed the Site on the Registry of Inactive Hazardous Waste Sites.

ISC, as the former property owner and successor to Magna Metals, entered into an Order on Consent with NYSDEC agreeing to implement an environmental investigation and feasibility study for the Site in 1996. In cooperation with that Order, an Access Agreement was executed between ISC and Baker Capital, providing ISC access to conduct its remedial investigation and studies as required by the Department.

Now, after ISC has proved unresponsive, NYSDEC has indicated that Baker Capital could be responsible for site conditions existing and determined to be present prior to its purchase of the property. Based on the legal reasoning provided below and otherwise, Baker Capital has no liability under CERCLA for the contamination at the former Magna Metals Site.

Third-Party Defense

As we have previously discussed, Second Circuit case law recognizes a Third Party Defense to CERCLA liability for the current owner of contaminated property where the contamination:

- was wholly caused by the acts of a third party;
- the third party is not one whose act or omission occurred in connection with a contractual relationship with the current owner; and
- the current owner exercised due care with respect to the hazardous substances and took precautions against foreseeable acts or omissions of the third party. See Lashins Arcade, 91 F.3d 353 (2d Cir. 1996) citing CERCLA § 9607(b)(3).

Indeed, in Lashins, the Second Circuit found the current owner had a valid defense to contamination caused by a third party with circumstances nearly identical to the one here. As in Lashins, Baker Capital took title to the property with no awareness of any on-going investigation of the Site by NYSDEC. In addition, like the owner in Lashins, Baker Capital was not privy to any of the notices from NYSDEC relative to the listing of the former Magna Metals Site. In fact, NYSDEC continued to formally publish the site description without reference to Baker Capital.



Also of note, Baker Capital paid full market value for the property unaware at the time they took title of the later determined extent of environmental conditions. Notwithstanding these facts, Baker Capital's knowledge of whether the property was contaminated is irrelevant to its invocation of the third party defense, as recently recognized in NYS Elec. & Gas v. FirstEnergy, 808 F.Supp.2d 417, 517 (N.D.N.Y. 2011) (*Lashins* is still good law "regardless of whether [the current owner] knew or should have known of the existence of hazardous substances on the property at the time of purchase.").

As regards components of the *Lashins* defense, first, there is no question that the contamination was **wholly caused by the acts of a third party** – that being ISC, the successor entity to Magna Metals. This is precisely what the 1996 Order on Consent demonstrates. Baker Capital's tenants primarily have used the property for wholesale and warehousing. Baker Capital has not contributed to the contamination at the Site; the remedy drivers are all related to Magna Metals. All hazardous disposals took place prior to Baker Capital's purchase of the property.

Second, Baker Capital had **no contractual relationship** with ISC other than executing the purchase contract for the property. As the Second Circuit recognized in *Lashins* and subsequent cases upholding the third-party defense, this type of contractual relationship is insufficient to establish liability because it had no connection with the offending releases – the hazardous wastes generated as part of the plating process – which all occurred prior to Baker Capital taking title to the property. Baker Capital may not be held liable under CERCLA by virtue of a purchase contract. See *Lashins*, 91 F.3d at 360; compare US v. 175 Inwood Assoc., LLP, 330 F. Supp.2d 213, 229 (E.D.N.Y. 2004) (defendant could not establish a valid third party defense because it had a lease with the third party related to activities resulting in the disposal of hazardous materials, which allowed it to assert control over the lessee's activities.).

Third, Baker Capital has shown **due care** where the contamination is concerned by fully cooperating with NYSDEC's oversight of the remediation. Baker Capital executed an Access Agreement with ISC within months of the Consent Order allowing ISC access to conduct its remedial investigation, and has been diligent in providing responses and documents to ISC and NYSDEC as requested. Baker Capital agreement to implement the SSDS further demonstrates its continued cooperation with NYSDEC's oversight of the remedy.

Case law subsequent to *Lashins* continues to support that Baker meets the third party defense. A current owner qualifies for the third-party defense, where, as here, it cooperated by permitting access to the site and voluntarily providing aid in the investigation of the site. See *FirstEnergy*, 808 F.Supp.2d at 519. Baker Capital's conduct is a far cry from the obstinacy that Courts have held to constitute a failure to exercise due care. See, e.g., *id.* at 518-19 (defendant did not qualify for the third-party defense where it failed to cooperate with the third party's remediation of the site, including extending negotiations for the sale of the property, which ultimately forced NYSDEC and the third party to modify the remedy, and failing to provide requested feedback, delaying issuance of the PRAP. However, defendant



was entitled to the defense for a different parcel where it allowed access and cooperated with the investigation and remediation of the site); see also Idylwoods Assoc. v. Mader Capital, 956 F.Supp. 410, 418 (W.D.N.Y. 1997) (defendants did not qualify for the third-party defense because they distanced themselves from the property upon learning that it was contaminated by ceasing to make tax payments in hope the property would go into foreclosure, and further by ignoring NYSDEC requests to remove contaminated materials).

Based on the Second Circuit's decision in Lashins, and subsequent decisions upholding that precedent, Baker Capital is clearly not liable to the State or any third party for site costs. Installation of the SSDS is a continuation of good faith efforts on the part of Baker Capital to demonstrate its cooperation with NYSDEC's efforts to prevent further harm to human health or the environment based on the contamination from the former Magna Metals Site and Magna's operations.

Any technical questions concerning the ongoing evaluation and installation of the SSDS should be addressed to Donald Duthaler, Baker Capital, 914-461-9344. Please also call me to discuss Baker's position at your convenience and after you have reviewed this correspondence.

Very truly yours,

HANCOCK ESTABROOK, LLP

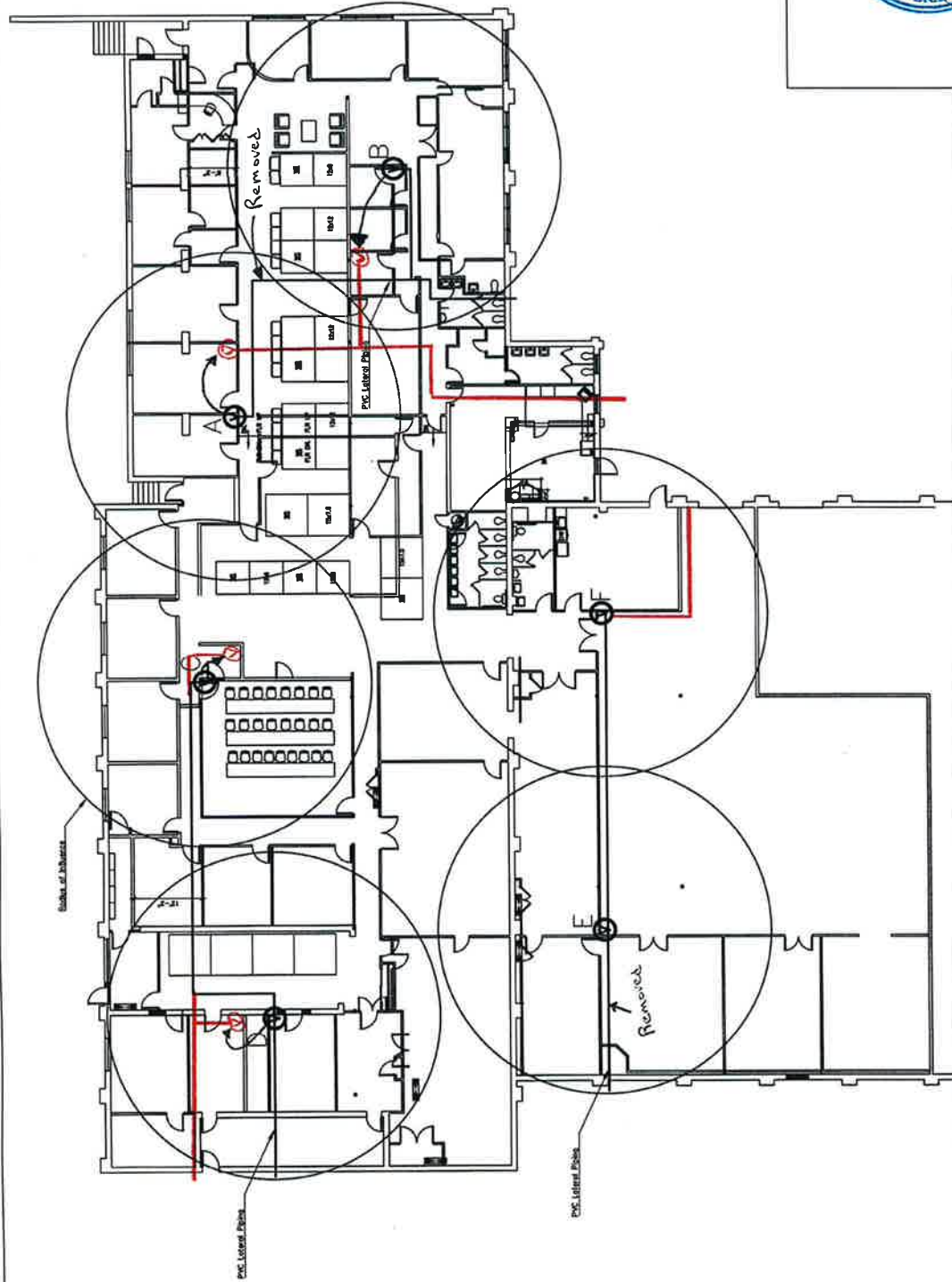

Doreen A. Simmons

DAS
Attachment



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EXHIBIT 1



SITE: BAKER CAPITAL - SSDS INSTALL
510 Furnace Dock Rd.
Cortlandt, NY

FIGURE 2 - PROPOSED SSDS EXTRACTION POINTS

DATE: 11-8-2011

SCALE: NTS

EXPERTISE YOU CAN COUNT ON

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